IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01025-RPM

VIDEO PROFESSOR, INC., a Colorado corporation,

Plaintiff,

v.

DEAN GRAZIOSI, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Video Professor, Inc. ("VPI"), through its attorneys, Fairfield and Woods, P.C., hereby submits its Memorandum of Law in Support of its contemporaneously-filed Motion for Preliminary Injunction ("Motion"), and states:

INTRODUCTION

On May 5, 2009, VPI filed a Complaint to remedy acts of, *inter alia*: attempted extortion through a racketeering enterprise under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Colorado Organized Crime Control Act ("COCCA") predicated on Defendants' acts of extortion under both state and federal law, theft and criminal impersonation; constructive fraud; deceptive trade practices under the Colorado Consumer Protection Act ("CCPA"); unfair competition; tortious interference with business opportunities; business disparagement; and libel *per se*.

VPI seeks a preliminary injunction to prevent Defendants from continuing to utilize the vehicle of their extortion and racketeering enterprise—the Infomercialscams.com website—and, thereby, to prevent further extortionate activities by the Defendants. In the Action, VPI also seeks compensatory, punitive, statutory and treble damages, an accounting, the imposition of a constructive trust upon Defendants' illegal profits, and its costs and attorney's fees.

STATEMENT OF FACTS

A. The Parties

Plaintiff VPI is a Colorado corporation headquartered in Lakewood, Colorado, which, over the past twenty years, has established itself as the world-wide leader of developing and marketing computer learning products. A significant portion of its marketing and the sales of its products occurs through its Internet website. VPI has used the name "Video Professor" in the promotion of its business since at least 1987, and has invested millions of dollars to create the goodwill, international recognition and reputation for quality products enjoyed by VPI. VPI holds registered trademarks for the words "Video Professor," which are an essential and invaluable element of VPI's goodwill, business assets and intellectual property. VPI has a long-established presence as an Internet retailer. VPI uses, among others, the domain name "videoprofessor.com" as a link to its website. VPI's website advertising and sales are a large and expanding portion of its business.

Defendant Infomercial Consumer Awareness, Inc. ("ICA") is a Nevada corporation and, upon information and belief, has an ownership interest in, and does business as, Infomercialscams.com ("Infomercialscams"). Defendant Dean Graziosi ("Graziosi") is an Arizona resident, is a principal and has an ownership interest in ICA. Defendant Ryan Patten

a/k/a Ryan Jackson is an Arizona resident, an associate and partner of Graziosi in, and primary spokesman for, ICA. Defendant Justin Leonard ("Leonard") is an Arizona resident and is the founder and owner of Defendant Leonard Fitness, Inc. ("Leonard Fitness"). Both he and Leonard Fitness are associated with Graziosi, Patten, and ICA, and do business as Infomercialscams. Defendants John Does one through 10 are persons associated with Infomercialscams whose names and addresses of residences are unknown.

B. The Wrongful Conduct

i. The Infomercialscams website

VPI has been aware of and has monitored the Infomercialscams website (www.infomercialscams.com.) for several years. The Infomercialscams site was founded and operated by Leonard through Leonard Fitness. Leonard remains active and involved in the Infomercialscams website, as well as the "Consumer Protection Program," described *infra*. The Infomercialscams website is a website where persons may anonymously post complaints regarding companies that advertise their products through television infomercials ("Infomercial Companies") and which was created to provide impartial advice for consumers. VPI is one of the Infomercial Companies with a webpage on the Infomercialscams site devoted to "bashing" it.

As a practical matter, based upon the protections afforded anonymous speech under the First Amendment to the United States Constitution, individuals who post complaints against VPI are able to "bash" the company with total anonymity and without regard or concern for the truth of postings' content or for potential liability for defamation. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995) (discussing tradition of protection afforded anonymous speech under First Amendment). With regard to the VPI postings on

Infomercialscams, VPI has long believed that the vast majority are false and libelous. However, in addition to the protections afforded anonymous speech for the anonymous posters of the defamatory statements, website operators have traditionally relied upon the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), which provides immunity to certain webpage operators from liability for the libelous content of third-party content providers. This CDA immunity, and its inapplicability to the Defendants, is discussed further *infra*.

ii. Google search engine

Potential VPI customers typically locate VPI's website to review and purchase its products by using the Internet's most popular search engine, Google. By "googling" the name "Video Professor," the user is presented with search results, which at the top of the search results page lists a link to VPI's home page. *See* Exhibit A (screenshot of Google search results for "video professor" dated May 16, 2009). The order or ranking of the Google search results is a function of various search criteria used by Google, including important criterion related to metadata and metatags, which are text buried in a website's source code invisible to the public that are read and later used by search engines to classify the website and to rank its relevance in response to a given Internet search query.

A website owner can manipulate search results by imbedding metatags and metadata in their source code, termed "search engine optimization," to push their website higher in the Google search results with respect to a search for certain search terms. While the use of generic metadata by website owners is entirely lawful, the use of trademarked metadata by persons other than the owner or licensee of such trademark constitutes illegal trademark infringement. *See Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006). Upon information and

belief, Defendants have not only improperly "optimized" the Infomercialscams website using VPI's trademarks, but have also re-written some or all of the consumer postings on the Infomercialscams website to further optimize their search engine rankings.

VPI's prospective customers searching for VPI on Google, and being presented with the Infomercialscams website in one of the top five search result positions, would have reservations about purchasing its products, especially if they navigate to the Infomercialscams website and are confronted with the defamatory postings therein. As a result of the improper use of VPI's trademarks in metadata and metatags (optimizing the Infomercialscams site for the search results for VPI), VPI has lost significant goodwill, has suffered the diminution of its reputation and has lost sales.

Even more objectionable is Defendants' inclusion of advertisements by and for directly-competing products and companies interspersed within the "rants" about VPI. In fact, Defendants actually rank the competing products by a number of "stars," and provide either an endorsement and/or a recommendation, or a criticism about the company or the product (the "Five Star Program"). Exhibit B (screenshot of using eBay software review page dated May 16, 2009). Although the Defendants purport to offer advice and endorsements based on "extensive research" and out of benevolent concern for consumers; in reality, Defendants receive a kickback/commission from companies they endorse which are in direct competition with VPI.

By combining the libelous postings with their advertisement of directly-competing products and companies, the Defendants are engaging in deceptive trade practices, as well as product disparagement (the "Smear Ad Campaign"), all to their significant financial gain. This

issue is discussed further *infra*. The Defendants were at all times aware of the deleterious effects of the Infomercialscams website on the reputation, goodwill and sales of VPI.

iii. The extortionate "Consumer Protection Program"

As noted above, given the high ranking of the Infomercialscams website in the search results of a Google search for "video professor"—driven up by improperly using VPI's trademarks in metatags and metadata and manipulating the contents of postings—it is highly likely that any person searching for "Video Professor" on Google would be exposed to the Infomercialscams' link to its webpage of "Video Professor Complaints." Defendants' manipulation of the site through the improper use of the metadata and metatags is done intentionally in order to create extreme economic leverage over VPI to Defendants' ultimate considerable economic advantage, on which they have recently attempted to capitalize through the introduction of their extortionate "Consumer Protection Program" ("CPP").

The home page of Infomercialscams now contains, as its lead article, the following highly conspicuous message:

> **Latest News**
>
> **InfomercialScams.com Launches Consumer Protection Program**
>
> To help consumers get quality products and services, and companies improve customer satisfaction and client relations InfomercialScam.com has launched the Consumer Protection Program (CPP).
>
> If your company is listed on InfomercialScams.com and you would like help improving client satisfaction, which will improve your overall image, fill out the CPP application form

See Exhibit C (Emphasis in original). By "clicking" on the "CPP application form" link in the above article, one is taken to a page stating:

> **Feel like you or your companies [*sic*] misrepresented on Infomercial Scams? Have you improved parts of your company? Are there reviews you don't think are from real clients? Want the chance to defend yourself?**
>
> Fill out the form below to see if you qualify for our Consumer Protection Program (CPP). Once you have submitted all the information we will review it thoroughly so we have a better understanding of your company. All answers will be kept strictly confidential and will only be used for internal CPP use. We will contact you within 48 hours of the form submission.

See Exhibit D (Emphasis in original).

VPI was interested in learning more about the CPP and, in March 2009, VPI completed and submitted the "application form" electronically. Shortly thereafter, VPI received a telephone call from an individual identifying himself as Ryan Jackson, who stated he was a "partner" of "Doug Smith" in the Infomercialscams' CPP.

a. The basic CPP Option

Mr. Jackson set out how the CPP scheme operated. He stated that if a company "qualifies" for the program, Infomercialscams announces that fact on its site and makes very favorable comments about the company and how it wants to work with its customers to insure complete customer satisfaction. Mr. Jackson stated that "qualification" for the program consisted of making the requisite payments associated with membership in the program. Very early on in the conversation, VPI became suspicious that the CPP was in fact a blatant means to extort money from Infomercial Companies by offering them the only possible means to remove the defamatory and negative anonymous postings on the Infomercialscams website, which postings negatively impact their reputations, goodwill and sales.

Mr. Jackson stated that the goal of the CPP was to "clean-up" a company's public image. Mr. Jackson stated that once the funds were paid, with respect to existing consumer postings,

those consumers would be emailed by Infomercialscams and given an email address at VPI to contact to rectify the consumer's complaint. Once the consumer was notified by Infomercialscams, Infomercialscams would *assume* that after a short period of time—approximately ten (10) days—the complaint would have been resolved and Infomercialscams would remove the posting.

Similarly, with respect to negative postings made after VPI joined the CPP (*i.e.*, paid the money), immediately upon the receipt of a negative posting, Infomercialscams would send the consumer the email directing them to contact VPI. Following a period of approximately ten (10) days, Infomercialscams would *assume* the complaint had been resolved and the public would never see the posting. Instead of being posted on the Infomercialscams public page, the new negative posts would be held in a "holding" page between the time it was received and the time it was deleted, and would not be accessible to the public.

Mr. Jackson was clear that as long as VPI kept making its monthly payments, none of the negative postings would be visible to the public. When asked about the cost of membership in the CPP, Mr. Jackson stated that it would require an initial payment of $157,500.00, followed by monthly payments of $23,750.00. *See* Exhibit E, at p. 3, ¶¶ 4, 5, which is a true and correct copy of the agreement provided to VPI by Mr. Jackson. Mr. Jackson further provided that the monthly payments would have to be made for a five (5) year period. In sum, in exchange for payments of money over five years, Infomercialscams would remove defamatory postings about VPI from its site, block future negative posts about VPI, *and actually tout VPI's virtues—all after many years of vehemently bashing VPI*.

If VPI had succumbed to the extortionate pressure and accepted this "option" under the CPP, Infomercialscams would have extorted approximately $1.5 million dollars from VPI over the five-year period. Following some price negotiation, the membership fee in the CPP for VPI was reduced to a $100,000.00 up-front payment, and monthly payments of $10,000.00 thereafter.

b. The "Delisting Option"

At some point, VPI asked what it would cost to simply remove the entire Video Professor webpage from the Infomercialscams site so that all the current postings would disappear, and there could be no new defamatory postings. Mr. Jackson referred to this as Infomercialscams' "Delisting Option," and said that option would cost more. He later informed VPI that the price for delisting would be $400,000.00 up-front, and $10,000.00 per month for five (5) years. If VPI had given in to the extortionate pressure and accepted the "Delisting Option," Infomercialscams would have extorted $1 million dollars from VPI over a five-year period.

iv. "Doug Smith"

During VPI's conversations with Mr. Jackson, VPI asked who owned Infomercialscams. Mr. Jackson replied saying "Doug Smith," and that he was Doug Smith's partner. In a subsequent telephone call with Mr. Jackson, and in an effort to determine more information about the scheme, VPI said it would like to talk to another company that had already signed on to the CPP. Mr. Jackson called back with Defendant Graziosi on the telephone line with him. Graziosi is a well-known person in the infomercial business, with his book entitled "Profit from Real Estate Right Now" infomercials. Graziosi made exceptionally favorable comments about the CPP. He also provided that after joining the CPP, his book infomercials, which previously

had been bashed by consumers, had recently been awarded Infomercialscams' five-star rating under the Five Star Program.

Upon information and belief, while "Doug Smith," is represented to be the sole owner of ICA, the address and telephone number used for "Doug Smith" is in reality the address and phone number of Graziosi. Upon information and belief, Doug Smith, the purported owner of ICA, is a fictitious individual, and the real owner is Graziosi. VPI has also learned that "Ryan Jackson" is also a fictitious name for Ryan Patten, who lives in a home and drives a vehicle owned by Graziosi. The investigation into the CPP was made especially difficult due to the use of these fictitious names and untraceable, pre-paid disposable cells phones, used by at least two of the Defendants.

VPI has also learned that in addition to Graziosi's purported membership in the CPP, at least one other Infomercial Company, Direct Buy, has "signed-up" for the program by paying the Defendants' extortionate demands. Immediately following Direct Buy's membership in the CPP, all negative postings about Direct Buy disappeared from the Infomercialscams website and were replaced with glowing testimonials. Further, at least one other company has inquired into participation in the CPP. In that case, the company was quoted an initial payment of $500,000.00, and $25,000.00 a month thereafter for the "Delisting Option." The cost to that victim over a five-year period would be $2 million dollars.

v. Infomercialscams *is* the scam

During the conversations, Mr. Jackson explained to VPI that even without the CPP, Infomercialscams is a revenue-generating site. Mr. Jackson explained that the VPI complaint webpage alone on the Infomercialscams website receives 20,000 "hits" or visits per month from

people conducting a search for VPI, and, observing and clicking on the Infomercialscams link in the search results, the individuals navigate to the site bashing VPI, which generates a "hit."

When the person arrives at the Infomercialscams webpage for VPI complaints, he is presented with linked ads to the websites of numerous companies, some of which are direct competitors of VPI. Each of the competitors is rated under the Five Star Program. Mr. Jackson explained that Infomercialscams receives a "bounty" for each of the 20,000 hits that Infomercialscams converts to a sale for any one of these directly-competing companies. Upon information and belief, the highest five-star ratings are given to the company paying Infomercialscams the greatest bounty or kickback/commission with little to no consideration given to the quality of its products. Mr. Jackson indicated that Infomercialscams is already generating $21,000.00 per month in revenue from the redirection of potential VPI customers to VPI's competitors' websites.

Even more troubling, Infomercialscams tells the public that "protecting you is not cheap," and actually requests donations to its "Legal Defense Fund." The public is told that Infomercialscams' aim is "helping consumers like yourself." *See* Exhibit F. Consumers who visit the Infomercialscams site believe it to have only the consumers' best interests in mind. Nowhere on the site are they advised that the site is a revenue-generating business making millions of dollars off the postings of the unsuspecting consumers by recommending products based on secret kickbacks and extorting money from infomercial companies in exchange for removing the consumers' posts from the site. The injuries inflicted by the Infomercialscams website scheme are patent and are attended by circumstances of fraud, malice, and willful and wanton conduct.

ARGUMENT

VPI has Met the Standard for Entry of a Preliminary Injunction.

A preliminary injunction should enter when a party establishes the following: "(1) the movant will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood the movant ultimately will prevail on the merits; (3) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest." *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999). A party seeking an injunction under the COCCA need not establish the irreparable harm element. C.R.S. § 18-17-106(6); *see also Nat'l Union Fire Ins. Co. v. Kozeny*, 115 F. Supp. 2d 1210, 1230 (D. Colo. 2000). Each element is discussed *seriatim infra*.

A. VPI is suffering irreparable harm.

Although not necessary for injunctive relief under COCCA, as more fully set forth in the Complaint (which is incorporated herein by this reference), the Defendants are engaged in an industry-specific conspiracy and scheme to: (1) drive the Infomercialscams website to the top of the Google search results for VPI by, *inter alia*, improperly using protected trademarks, metadata and metatags, and altering or fabricating alleged third-party anonymous postings to the website, *see* Exhibit A (screenshot of Google search results for "video professor" dated May 16, 2009); (2) expose those prospective VPI customers to libelous postings about VPI; (3) divert prospective VPI customers for Defendants' profit; and (4) direct those potential customers to VPI's competitors' websites in exchange for a kickback/commission through supposed impartial personal endorsements of directly-competing products. The Defendants in fact obtain a

kickback/commission from VPI's direct competitors, based upon the number of hits by potential VPI customers diverted away from navigating to VPI's website and, instead, directed to VPI's competitors' websites through the Infomercialscams website.

By ranking VPI's competitors from one to five "stars," which, based upon information and belief, appears in the order of the amount of the kickback/commission received from the Defendants' affiliated companies, Infomercialscams and its associates have applied an enormous degree of pressure upon VPI by essentially stealing away VPI's customers for their financial gain. Moreover, irreparable harm to VPI's goodwill, intellectual property, reputation and future business prospects has occurred, and continues to occur on a daily basis, as a direct and proximate result of Defendants' improper acts and schemes.

The system is also a deceptive trade practice because consumers would naturally believe the number of "stars" given a competitor—Infomercialscams.com's affirmative endorsement of a directly competing product—is related to the quality of the product and company. *See* Exhibit B (screenshots of the "eBay" portion of the Infomercialscams website dated May 16, 2009). The users of the Infomercialscams website are not informed of the Defendants' significant financial interest in endorsing VPI's competing products on their website. *See generally, id*. Put plainly, through their juxtaposition of the libelous anonymous third-party postings, along with advertisements from and advertisement of directly-competing companies, as well as their endorsement of those competing products with its Five Star Program and related monetary kickbacks/commissions, the Defendants are engaging in a deceptive advertisement campaign founded almost exclusively on improper product disparagement, *i.e.*, the Smear Ad Campaign.

Defendants have attempted recently to further capitalize on the above-described pressure point by seeking to extort significant amounts of money from VPI (and other members of the infomercial industry) by offering to remove the libelous postings, remove the links to VPI's competitors' websites, block future negative posts about VPI, and actually tout VPI's virtues—all for a price. This latest extortionate scheme is ironically termed by Defendants the "Consumer Protection Program." *See* Exhibit C (screenshots of the CPP dated April 28, 2009, also attached to the Complaint as Exhibit B); Exhibit D (screenshot of promotional advertisement for CPP and application entries dated April 28, 2009, also attached to the Complaint as Exhibit C); Exhibit E (details of CPP including pricing structure, also attached to the Complaint as Exhibit D). This pattern of malfeasance, including the Smear Ad Campaign and the extortionate CPP, has and will continue to cause damage to VPI's goodwill, reputation and value of its intellectual property rights—which harms are difficult to calculate and which cannot be adequately recompensed monetarily.

B. VPI will prevail on the merits.

As noted *supra*, VPI has brought claims against the Defendants under RICO and COCCA, the Lanham Act, and for constructive fraud, deceptive trade practices under the CCPA, unfair competition, tortious interference with business opportunities, business disparagement, and libel *per se*. For purposes of this Motion, VPI will discuss only the statutory claims, as well as the libel *per se* claim.

i. RICO

Section 1962 of RICO provides, in relevant part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

> commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962. A "'pattern of racketeering activity' requires at least two acts of "racketeering activity." 18 U.S.C. § 1961(5). "Racketeering activity" is defined at Section 1961(1) of RICO as "(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 [The Hobbs Act] (relating to interference with commerce, robbery, or extortion) . . . ." 18 U.S.C. § 1961(1)(B).

"Enterprise" is defined under RICO as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]" 18 U.S.C. § 1961(4). The enterprise alleged in this case is "a group of individuals associated in fact although not a legal entity," which group consists of Doug Smith, Dean Gratziosi, Ryan Patten and Justin Leonard.

The racketeering activity alleged in this case includes Defendants' violation of the federal Hobbs Act. The Hobbs Act, 18 U.S.C. §§ 1951, *et seq*., provides, in relevant part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). "Extortion" is defined under the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Where the offender has no lawful claim to the money or property being demanded, threat of financial harm and the obstruction of

free business choice through economic duress can establish a Hobbs Act violation. *See, e.g., Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523-24 (3rd Cir. 1998); *see also U.S. v. Vigil*, 478 F. Supp. 2d 1285, 1297-98 (D. N.M. 2007). Threats to reputation can also constitute extortion. *See, e.g.*, 18 U.S.C. § 891(7) (defining "extortionate means" as, among other things, express or implicit threats of use of violence or other criminal means to cause harm to reputation); C.R.S. § 18-3-207(1)(a) (same).

Accordingly, to prevail on a claim under RICO, VPI must establish that: (1) the Defendants engaged in two or more acts of extortion (as defined under the Hobbs Act); (2) as part of an enterprise (as defined under RICO); and (3) which affected interstate or foreign commerce. *See* 18 U.S.C. § 1962(c); *see also* 18 U.S.C. § 1951(a), (b)(2). Stated otherwise,

> To successfully state a RICO claim, a plaintiff must allege four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." The second RICO element, an enterprise, "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Despite the apparent breadth of this definition, to properly plead an enterprise a plaintiff must allege three components: (1) that there is "an ongoing organization with a decision-making framework or mechanism for controlling the group," (2) "that various associates function as a continuing unit," and (3) "that the enterprise exists separate and apart from the pattern of racketeering activity.

Kearney v. Dimanna, 195 Fed. Appx. 717, 720 (10th Cir. 2006) (unpublished opinion) (internal quotations retained, internal citations omitted).

The Infomercialscams website (and its libelous postings and manipulation thereof to advance the Smear Ad Campaign and improper misdirection of potential VPI customers to competitors' sites in exchange for a kickback) is the vehicle which has allowed the Defendants to apply significant extortionate pressure upon VPI and other infomercial companies, which conduct constitutes extortion and racketeering. *See, e.g., Hy Cite Corp. v.*

Badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005) (denying motion to dismiss and holding that extortionate scheme almost identical to the Defendants' CPP constituted a *prima facie* case under RICO for threatened extortion where bash site operators of Rip-Off Report.com—who solicited and encouraged libelous postings about companies—offered to remove the libelous postings which were allegedly created in part by the defendants, to block future negative posts and, thereafter, tout the plaintiff company in exchange for significantly less sums of money than at issue in this case). By negatively impacting VPI's Internet sales of its products, extortionate demands for moneys transmitted across state lines, as well as its receipt of kickbacks from companies in direct competition to VPI located in various states, the conduct complained of herein plainly affects interstate commerce.

With respect to the pattern requirement, the extortionate conduct has occurred on at least four known occasions, with at least two companies actually succumbing to the pressure and agreeing to pay Defendants' extortionate demands, *i.e.*, Direct Buy and Graziosi. The acts alleged were related to each other by virtue of common participants, a common victim industry (Infomercial Companies), a common method of commission (the Infomercialscams website and its CPP scheme), and the common purpose and common result of extorting or attempting to extort Infomercial Companies of millions of dollars and enriching Defendants at the expense of VPI and others. Therefore, the requisite *prima facie* elements of a RICO claim based upon predicate acts of extortion have been met, thereby establishing VPI's likelihood of success on the merits.[1]

[1] To the extent Defendants seek to rely on the Communications Decency Act, 47 U.S.C. § 230 ("CDA") for immunity, such immunity is not available for, *inter alia*, criminal conduct. *See, e.g.*, 47 U.S.C. § 230(e)(1) (excepting Federal criminal statutes from the scope of the CDA's

ii. COCCA

In many respects, COCCA, C.R.S. §§ 18-17-101, *et seq.*, mirrors and is in fact modeled upon RICO, and, for purposes of this Motion, based upon the foregoing discussion regarding the RICO violation, VPI has established a likelihood of success on the merits of its COCCA claim as well.[2] *Benson v. People*, 703 P.2d 1274, 1276 n.1 (Colo. 1985) (providing COCCA modeled on RICO).

iii. Lanhan Act

The Lanham Act proscribes and provides a civil remedy for, *inter alia*, product disparagement. 15 U.S.C. § 1125(a) provides, in relevant part:

> **(1)** Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name . . . or any combination thereof, . . . or any false or misleading description of fact, or false or misleading representation of fact, which—
>
> * * *

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immunity); *see also Hy Cite Corp.*, 418 F. Supp. 2d 1142 (discussing CDA in context of certain claims but not addressing the CDA with regard to finding a *prima facie* civil case under RICO on facts almost identical to those presented here); *NPS LLC v. StubHub, Inc.*, 2009 WL 995483, *13 (Mass. Super. Ct. 2009) (unreported decision) (website operators who knowingly engaged in scalping of tickets in violation of state law stripped of immunity under CDA).

[2] Under COCCA, criminal impersonation can also constitute a predicate act to establish racketeering activity. C.R.S. § 18-17-103(5)(b)(IV) (citing C.R.S. § 18-5-113, which provides, in relevant part, "(1) A person commits criminal impersonation if he knowingly assumes a false or fictitious identity or capacity, and in such identity or capacity he: . . . (c) Confesses a judgment, or subscribes, verifies, publishes, acknowledges, or proves a written instrument which by law may be recorded, with the intent that the same may be delivered as true; or (d) Does an act which if done by the person falsely impersonated, might subject such person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty; or (e) Does any other act with intent to unlawfully gain a benefit for himself or another or to injure or defraud another.").

> **(B)** in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125 (bold in original).

In this case, and as described in detail above, the Defendants are utilizing and adopting as their own the third-party anonymous and defamatory posts appearing on their website as part of their Smear Ad Campaign, wherein they make false and misleading representations of fact regarding VPI, its products and policies. The Smear Ad Campaign is directed towards disparaging VPI and in promoting VPI's direct-competitors.

Infomercialscams is represented to consumers to be born of benevolence and altruistic concern for their wellbeing. Defendants represent themselves to be providing impartial advice about products based on "extensive research" when endorsing companies on their website. In reality, however, and unbeknownst to the consumers, the Defendants' "impartial advice" is in reality pure advertisement for the companies they endorse on their site through the Five Star Program. Upon information and belief, the Defendants rank and endorse VPI's competitors in order of the size of the secret kickback they receive from such companies by directing would-be VPI customers to the competitors' websites. In that regard, Defendants are deceiving consumers, disparaging VPI and are, in fact, in direct competition with VPI for similar products. The Smear Ad Campaign is a violation of the Lanham Acts' prohibition of, among other things, product disparagement.

iv. Deceptive trade practices under CCPA

To establish a claim under the CCPA, a party may establish, *inter alia*, that "in the course of such person's business, vocation, or occupation, such person: . . . (h) [d]isparages the goods, services, property, or business of another by false or misleading representation of fact . . . ." C.R.S. § 6-1-105(1)(h). By listing various proscribed acts, the CCPA did not act to limit or otherwise preclude actions regarding deceptive trade practices recognized at common law. C.R.S. § 6-1-105(3).

The libelous and disparaging postings on the Infomercialscams website are directly solicited and encouraged by Defendants.[3] Individuals visiting the Infomercialscams cite are confronted with advertisements for VPI's directly-competing products, which are ranked and endorsed by the Defendants under their Five Star Program with a certain number of "stars" and a personal blurb by an unknown author associated with the site which discusses the merits of the various companies the Defendants endorse. *See, e.g.*, Exhibit B (screenshots of Infomercialscams.com Video Professor Complaints, dated May 16, 2009).[4]

[3] *See, e.g., Certain Approval Programs, L.L.C. v. XCentric Ventures L.L.C.*, 2009 WL 596582 (D. Ariz. 2009) (unpublished opinion) (providing that similar website ripoffreport.com actively solicited libelous posts and used metatags to drive up the search results for Internet search of the plaintiff and where court found sufficient facts to preclude immunity under CDA in context of motion for leave to amend pleadings to add claim for misappropriation of name or likeness under state law and where defendants claimed futility of amendment citing CDA); *see also* Exhibit G (screenshots of Infomercialscams.com site wherein postings are solicited, dated April 30, 2009).

[4] The content of the site regarding endorsements of products and disparagement of VPI and its products constitutes commercial speech. *See Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001) (providing courts review (i) whether communication is advertisement, (ii) whether it refers to a specific product, and (iii) whether speaker has economic motivation for speech and noting that if all three factors are present, there is strong support for holding that it is less-protected commercial speech); *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032, 1057-58 (D. Kan. 2006) (discussing First Amendment's impact on Lanham Act claims

The individuals posting items or visiting the site are not made aware of the Defendants' financial interest in the products being endorsed in the form of kickbacks, but rather, are led to believe that the endorsement is a neutral expert opinion based on "extensive research" and motivated from purely altruistic and benevolent concern for their future wellbeing. *See generally*, Exhibit B. In reality, Defendants are the commission-based sales agents of the various companies competing with VPI, and, by combining arguably protected "rants"[5] with Defendants' Five Star Program and related Smear Ad Campaign—not to mention the extortionate CPP and the Delisting Option—Defendants are adopting the libelous postings as their own statements, converting them to their own pecuniary use as part of their Smear Ad Campaign and are in every sense "[d]isparag[ing] the goods, services, property, or business of another by false or misleading representation of fact." C.R.S. § 6-1-105(1)(h).

By way of one example of their product disparagement and endorsement of competing products in their Smear Ad Campaign, in reviewing software guides for use of eBay, and after

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and noting that defendant "bash" website operator and direct competitor of plaintiff "even included direct links to competitors[]" on the bash website it created and denying summary judgment for defendant).

[5] To the extent Defendants are actually composing the libelous postings appearing on the Infomercialscams website, there is no immunity under the CDA. *See, e.g*, 47 U.S.C. § 230(c) ("No provider . . . of a interactive computer service shall be treated as the publisher or speaker of any information provided by *another* information content provider.") (emphasis added); *see also Fair Housing Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). Of course, actual authorship is not necessary where the site operator plays a significant enough role in the editing, presentation, content and development of a website's content. *See id*. Further, portions of a site may be protected while others are not. *Id*. (holding open ended essay-type "additional comments" component of site not offensive to CDA while mandatory question-and-answer section involving discriminatory categories with pre-selected choice of responses in drop-down menu was violative and so stripped defendant of CDA immunity).

ranking VPI at the bottom of its Five Star Program with one "star," Defendants provide the following:

> **Video Professor- Make Money with Ebay** [sic]
> Infomercial [sic] is the Professors [sic] latest infomercial explaining ebay [sic]. Consumers have reported absolute horror stories about this company. I would not recommend this product based on what his customers have reported. Here is what some of his clients said on the [Infomercialscams] site:

Exhibit B at p. 4. The webpage then provides three highly inflammatory, false and defamatory excerpts from alleged VPI customers' postings. Thereafter, the Defendants provide:

> These are just a few of the over 500 complaints. Please do your research before purchasing anything from Video Professor.
>
> **Last Words:**
>
> For people wanting to make a change in their life, **a good plan of action is a must! . . . A step by step** [sic] **course that someone else learned by trial and error can equal massive profits!** If your [sic] reading this, I'm sure you already know this. That's why I have reviewed and read all the customer reviews of these [eBay software] courses. I stand 100% behind the ebay [sic] Internet Auction Kit, [sic] in my opinion, it's the best online marketing information available on the market. Google Money Tree is good too, but is more complicated and takes a little longer to make money with. One really cool thing as well, is that you can get the ebay [sic] Internet Auction Kit for FREE by using the webpage I have found and posted above. It's time for you to get out of the daily grind and start making massive profits online. Best of success!!!

Exhibit B at p. 5 (bold in original, capital letters in original, underscore added to indicate internal hyperlink). The Defendants then go on to provide not less than 27 pages of other false and libelous rants about VPI from additional alleged former VPI customers. *See id*. Through the juxtaposition of the rants, with their subjective review and endorsement of directly competing products—for which they receive undisclosed commissions for the redirection of potential VPI customers to the competitors' websites, including the ebay [sic] Internet Auction Kit site—the Defendants are engaged in nothing more than old-fashioned smear ads using false and

misleading facts. *See, e.g., Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032 (D. Kan. 2006). Based upon the foregoing, VPI will likely succeed on the merits of the CCPA claim.

iv. Libel *per se*

The elements of a claim for libel *per se* are: a (1) false publication; (2) made with reckless disregard to its truth; (3) which is defamatory as a matter of law; and (4) which causes actual damages. *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 899 (Colo. 2002). Here, Defendants have knowingly authored, modified and published false statements about VPI on the Infomercialscams website. The false statements posted on the website would lead reasonable persons to think less favorably about VPI than they would if they knew the truth. *Id*. The false statements are defamatory as a matter of law because they impugn VPI's honesty and competency in the conduct of its business. *See Bernstein v. Dunn & Bradstreet, Inc.*, 368 P.2d 780, 784 (Colo. 1962).

With respect to damages, VPI has lost—and will continue to lose—business from prospective VPI customers who "Google" VPI and are presented with the Infomercialscams link in the number three or four position for the search results. Additional damages include lost goodwill and reputation. Therefore, a *prima facie* case for libel *per se* has been made.

Defendants will no doubt cite the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), as support for the super-generic proposition that, as operators of a website, they cannot be liable for the content thereof. *See* 47 U.S.C. § 230(c)(1). It is this assumed protection under the CDA that gives rise to Defendants' Smear Ad Campaign and extortionate CPP. Defendants saw the CDA as a panacea for success. They first created and operated a successful bash site

which defames businesses, and, thereafter, converted the site to a business which generates huge revenues from falsely bashing its competitors and promotes competitors for a secret kickback.

Due to the Defendants' conduct, however, immunity under the CDA is unavailing. The Tenth Circuit Court of Appeals has described the CDA as follows:

> [The CDA] creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party. *See* [47 U.S.C.] § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). Specifically, § 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet. . . ." Finally, § 230(f)(3) defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

Ben Ezra, Weinstein, and Co., Inc. v. America Online Inc., 206 F.3d 980, 984-85 (10th Cir. 2000). The CDA was enacted to prevent the reoccurrence of the holding in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), where a website operator was deemed to be a "publisher" where it voluntarily deleted certain messages from its site on the basis of offensiveness and bad taste, and was, therefore, liable for defamatory posting it did not delete from its site. *See id*.

"In passing section 230, Congress sought to spare interactive computer services th[e] grim choice [of deciding whether to edit for some content and, thereby, become liable for all the content of their sites as publisher, or to ignore all content and do nothing in order to avoid potential liability as publisher] by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that

they didn't edit or delete. In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content . . . ." *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (emphasis in original).

The Defendants' anticipated assertion that the CDA bars liability for libel (and any other claim in the Complaint) is misguided, however, as website operators can be liable for content *they* create and develop. *See, e.g., id*. at 1162-63 ("A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content [and so afforded protection from liability under the CDA]. But as to content that it creates itself, or is 'responsible, in whole or in part,' for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.") (internal quotations retained); *see also Certain Approval Programs, L.L.C. v. XCentric Ventures L.L.C.*, 2009 WL 596582 (D. Ariz. 2009) (unpublished opinion); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006); *but cf., Ben Ezra, Weinstein, and Co., Inc.*, 206 F.3d 980 (where website operator simply republished erroneous stock quotes provided from third parties, CDA immunity applied to bar claims for defamation and negligence).

Put simply, Defendants enjoy no immunity under the CDA for libelous or illegal content they create or for which they play a role in the development thereof. As quoted above from the eBay portion of the Infomercialscams website, Defendants adopt as fact the false and defamatory statements of alleged third-party posters and add significant portions of content to the website in the form of: (1) supposedly neutral reviews of products; (2) supposedly neutral endorsements of

actually-competing products with their Five Star Program; (3) first-person bashes about VPI; and (4) blatant advertising statements which are, unknown to the viewers, self-promoting by endorsing products for which Defendants receive an undisclosed kickback/commission.

Additionally, based upon the criminal acts of Defendants, as well as the product disparagement and related deceptive trade practices alleged, the Defendants are stripped of any immunity to which they would otherwise be entitled under the CDA. The Defendants should be held liable for the defamatory content of their website that they encourage and solicit—to their direct financial benefit. *See, e.g., Certain Approval Programs, L.L.C., supra* (quoting *Fair Housing Council of San Fernando Valley*, 521 F.3d at 1167-68 and providing "[I]mmunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. *In other words, a website helps to develop unlawful content, and thus falls within the exception to [the CDA], if it contributes materially to the alleged illegality of the conduct*.") (emphasis added).

The public policy underlying the CDA was to ensure the free exchange of ideas in a then-burgeoning and fragile Internet, without saddling website operators with the burden of constantly policing content, while also allowing them the ability to control offensive or obscene content without the threat of liability for acting as the speaker or publisher of content provided by third-parties. *See generally, Fair Housing Council of San Fernando Valley, supra*. The immunity provided was not absolute and was never intended to absolve website operators for liability related to their own conduct. As it has been noted, "even if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer.

FN. 31. Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to [the CDA] for 'develop[ing]' unlawful content 'in whole or in part.'" *Id*. at 1171 (internal footnote and quotations retained) (citing 47 U.S.C. § 230(f)(3)); *see also id*. at n.31 (disavowing a theory that an information content provider is automatically immune as long as the data originates with another information content provider).

The Defendants' above-described conduct (as more fully set forth in the Complaint) constitutes a violation of RICO, COCCA, the Lanham Act and the CCPA. Further, their conduct also satisfies the elements of libel *per se*. Defendants cannot pervert, distort, misshape and transform the immunity afforded under the CDA from a shield for neutral conduct, into a sword for illegality. Accordingly, there is a substantial likelihood of success on the merits.

C. Balancing of the harms favors an injunction.

Due to the degree of continuing irreparable harm caused to VPI's goodwill, intellectual property, reputation and future business prospects each day by the Infomercialscams scheme, a preliminary injunction should enter. The minimal and temporary degree of financial harm that may be occasioned upon the Defendants by removing the Infomercialscams website and enjoining their CPP (and all similar extortionate schemes) pending a hearing on the permanent injunction is *de minimis* when compared to that harm inflicted upon VPI by denying the relief. Moreover, a bond will be available to redress any harm caused to the Defendants if the injunction is later determined to have been improvidently granted. Therefore, the balancing of the harms strongly favors the issuance of an injunction.

D. An injunction will serve the public interest.

The Defendants are engaged in racketeering and extortion for profit, among other malfeasance. The public interest in preventing such illegal actions would be furthered by enjoining the Defendants from continuing to operate their schemes through the Infomercialscams website. The conduct complained of herein could not be more adverse to the public interest, as evidenced by its proscription in the criminal laws of this nation and state. Therefore, an injunction to prevent such conduct is overwhelmingly in the public interest.

Undersigned is mindful of the protections afforded by the First Amendment to the United States Constitution related to free speech. U.S. CONST. amend. I. However, and for good reason, certain forms of criminal speech have never been afforded protection under the First Amendment. *See, e.g., Virginia v. Black*, 538 U.S. 343, 358-59 (2003) (collecting cases and categories of speech beyond protection, including "fighting words" and "true threats"). Further, because of its underlying profit-focused purpose, commercial speech is afforded less protection than other forms of discourse. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 548 (5th Cir. 2001).

Once the third-party libelous postings are adopted and utilized by the Defendants as part of their Smear Ad Campaign for their directly-competing products and extortionate CPP, their speech becomes criminal. Setting aside the extortionate CPP and the Delisting Option, in the best light, their speech becomes proscribed commercial speech. The Internet is not the delicate experiment it once was, and the CDA must be applied with reference to its express terms and its Congressional purpose, and should not be allowed to continence illegal and proscribed first-party commercial speech.

CONCLUSION

Based upon the foregoing, VPI respectfully requests that the Court grant its Motion for Preliminary Injunction (in the form of order attached thereto), and require the removal of the Infomercialscams.com website from the Internet pending a final resolution on the merits, prevent Defendants (and anyone acting in concert therewith) from continuing the "Consumer Protection Program" extortion scheme (or any other acts of extortion), and for such other and further relief as the Court deems just and proper.

Respectfully submitted this 5th day of June, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via CM/ECF electronic filing and/or First Class Mail on the 5th day of June, 2009.

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